BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of

AUTOSURANCE AGENCY, INC.

Appearances:

For Appellant : Orville R. Vaughn, dttorney at Law

For Respondent: W.M. Walsh, Assistant Franchise Tax Commissioner; Hebard I?. Smith, Associate Tax Counsel

OPINION

This appeal is made pursuant to Section 25 of the Bank and Corporation Franchise Tax Act (Chapter 13, Statutes of 1929, as amended) from the action of the Franchise Tax Commissioner on the protest of Autosurance Agency, Inc., to a proposed assessment of additional tax, the tax having been reassessed in the amount of $481.09, for the taxable year 1942.

Appellant, a Nevada Corporation, engaged in business in California as an insurance agency. The assessment here in question resulted from the action of the Commissioner in reducing from $625 to $75 a deduction claimed by Appellant in its return of income for 1941 for a Federal capital stock tax (imposed by former Section 1200, Internal Revenue Code) paid in that year and in including in its gross income for 1941 the amount of $11,477.26 representing insurance commissions received by Appellant but regarded by it as unearned at that time and, therefore, excludible from that income.

Appellant evidently considered the amount of the Federal tax payment deductible in its entirety under Section 8(c) of the Bank and Corporation Franchise Tax Act, which provides for a deduction of "taxes or licenses paid or accrued during the income year...", with exceptions-not material here. Appellant has not furnished us any evidence, however, respecting the payment of the tax and the action of the Commissioner in reducing the claimed deduction therefor to $75 must, accordingly, be sustained.

The Appellant contends that the Insurance Commissioner, acting pursuant to Section 1730 of the Insurance Code, required it to establish a trustee insurance bank account for the deposit of all gross insurance premiums received, that it complied therewith, and that! therefore, any amount deposited representing unearned commissions (presumably the $11,477.26) was not income and "cannot be included as a measure of the franchise tax under the Bank and Corporation Franchise Tax Act." The Section reads as follows:

> "1730. All funds received by an insurance agent, broker or solicitor, life agent, surplus line-broker, or motor club agent as premium or return premium on or under any policy are received by such agent, broker or solicitor in his fiduciary capacity. Any agent, broker or solicitor who diverts or appropriatessuch funds to his own use is guilty of theft and punishable for theft as provided by law."

In a Bulletin (No. 17) sent out to all insurance agents in September, 1941, the Insurance Commissioner cautioned all concerned against violating *Section* 1730, and, as one method of complying, recommended the opening of accounts of the kind established and maintained by Appellant. He further suggested that commissions be withdrawn at the time of forwarding the insurance companies their share of the premiums, retaining, however, an adequate sum in reserve for the discharge of any liability for the return of premiums.

The Commissioner asserts that the establishment of a reserve for unearned commissions is not mandatory and that the wording of the Bulletin is merely advisory. Even assuming, however, that the Statutory provision and the Bulletin support Appellant in its View as to the necessity for establishing and maintaining a trustee account, Appellant has not cited and we are unaware of any provision in the Bank and Corporation Franchise Tax Act permitting the exclusion of the so-called unearned commissions by insurance agencies. There is not, accordingly, in our opinion, any statutory basis for the exclusion for, as stated in Choteau v. Barnet, 283 U.S. 671, "The intent to exclude must be definitely expressed, where, as here, the general language of the act levying the tax is broad enough to include the subject-matter."

Irrespective of any trustee account requirement, any portion of a premium received by Appellant during 1941 constituting its commission for the writing of a policy was includible in its gross income for that year, notwithstanding any contingent liability to refund any or all of the premium in the event of a subsequent cancellation. Pertinent in this connection is the following language in Brown v. Helvering, 291 U.S.192, a matter similar to the one at hand on its facts and *issues* and involving the deductibility from the gross income of an insurance company general agent doing business in California of the amount of a credit to a reserve for unearned commissions:

> "The overriding commissions were gross income of the year in which they were receivable. As to each such commission there was the obligation-a contingent liability-to return a proportionate part in case of cancellation. But the mere fact that some portion of it might have to be refunded in some future year in the event of cancellation or reinsurance did not affect its quality as income....When received the general agent's right to it was absolute. it was under no restriction, contractual or otherwise, as to its disposition, use or enjoyment." 291 U.S. at page 199.

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 25 of the Bank and Corporation Franchise Tax Act, that the action of Chas, J. McColgan, Franchise Tax Commissioner, on the protest of Autosurance Agency, Inc., to a proposed assessment of additional tax, the tax having been reassessed in the amount of $481.09, for the taxable year 1942 be and the same is hereby sustained.

Done at Sacramento, California this 15th day of February, 1949, by the State Board of Equalization.

Wm. J. Bonelli, Chairman
J. H. Quinn, Member
J. L. Seawell, Member

ATTEST: Dixwell L. Pierce, Secretary